

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

WILLIAM MARK WESTMORELAND §
v. § CIVIL ACTION NO. 6:09cv336
DIRECTOR, TDCJ-CID §

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Petitioner William Westmoreland, proceeding through retained counsel, filed this application for the writ of habeas corpus complaining of the legality of his confinement. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Westmoreland is challenging a 45-year sentence for murder which he received in the 173rd Judicial District Court of Henderson County, Texas, in 2003. He has previously sought both state and federal habeas corpus relief concerning this conviction. *See Westmoreland v. Director, TDCJ-CID*, civil action no. 6:07cv361 (E.D.Tex.). This petition was dismissed with prejudice based upon the expiration of the statute of limitations on December 5, 2007. Westmoreland appealed this decision, and on August 18, 2008, the Fifth Circuit denied him a certificate of appealability, thus effectively affirming the district court's ruling and dismissing his appeal.

After review of the petition, the Magistrate Judge issued a Report recommending that the petition be dismissed without prejudice until such time as Westmoreland received permission from the Fifth Circuit Court of Appeals to file a successive petition, as required by 28 U.S.C. §2244(b)(3). A copy of this Report was sent to counsel for Westmoreland but no objections have been received; accordingly, Westmoreland is barred from *de novo* review by the district judge of those findings,

conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

It is accordingly


ORDERED that the Report of the Magistrate Judge (docket no. 5) is hereby ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled application for the writ of habeas corpus is hereby DISMISSED without prejudice, with refiling conditioned upon receipt of permission from the Fifth Circuit Court of Appeals to file a successive permission. Westmoreland may not refile this petition without first obtaining such permission. It is further

ORDERED that the Petitioner William Westmoreland is hereby DENIED a certificate of appealability *sua sponte*. The denial of the certificate of appealability relates only to an appeal of this case, and shall have no effect upon Westmoreland's right to seek permission to file a successive petition nor upon his right to pursue such a petition once permission is granted. Finally, it is

ORDERED that any and all motions which may be pending in this case are hereby DENIED.

SIGNED this 23rd day of September, 2009.


MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE